IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	
This Document Relates To:	§	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	
Plaintiffs,	§	
vs.	§	**Civil Action No. H-01-3624 (Consolidated)**
ENRON CORP., et al.,	§	
Defendants.	§	

DEFENDANT VINSON & ELKINS L.L.P.'S
MOTION FOR CERTIFICATION UNDER 28 U.S.C. § 1292(b)

Defendant Vinson & Elkins L.L.P. ("V&E") respectfully moves this Court to append the certification provided for in 28 U.S.C. § 1292(b) to the portion of the Court's Memorandum and Order filed December 20, 2002 that denies V&E's Motion To Dismiss (hereinafter, the "December 20 Order"). This Court implicitly recognized that the issues addressed in the December 20 Order were appropriate for immediate appeal, finding that they were "novel and/or controversial issues that the law has thus far not addressed or about which the courts are in substantial disagreement." (December 20 Order at 5). As the Court specifically recognized, application of its rulings to lawyers presents an especially "thorny" problem. (December 20 Order at 73). Prompt appelate review of these issues is essential to the efficient resolution of this important case and is of great importance to the legal profession and to those who do business with public companies.

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INTRODUCTION

As the Court's analysis makes clear, the issues presented by this case are precisely the kind of questions that § 1292(b) was enacted to address. The questions are novel, they are pure questions of law, they are outcome determinative, and they will have an immense impact on the legal profession as well as the efficient and just resolution of this case. Certification would therefore be faithful to the Fifth Circuit's admonition that, when an "important" issue has "polarized" the courts, it is "highly principled" for a district court to certify the issue under § 1292(b). *Grant v. Chevron Phillips Chem. Co. L.P.*, 309 F.3d 864, 866 (5th Cir. 2002).

The Court has made rulings that have broad ranging impact on the securities bar. The issue of greatest importance to V&E is the Court's acceptance of the SEC's proposed standard for primary liability under Section 10(b) of the Securities Exchange Act of 1934, under which a defendant who is a "creator" of a false or misleading statement would be subject to liability. As the Court outlined in its extended and thorough discussion of the two competing standards developed in the case law, this is an issue of major significance about which there is very substantial disagreement.

This is the first case in which the "creator" standard has been applied to a law firm that allegedly assisted its client with public disclosures. Although the Complaint generally alleges that V&E "drafted and approved" virtually all of Enron's public statements, the plaintiffs do not – and cannot – allege that V&E issued any statements in its own name about Enron, sold Enron securities to the investing public, acted as principal in the transactions with Enron, or invested its own money in any Enron partnerships or special purpose entities. In addition, V&E's Answer directly controverts Plaintiffs' allegations. The firm's role in Enron's public

disclosures was substantially limited. V&E was not consulted on many of Enron's periodic securities filings, which were drafted by Enron's in-house accounting and legal departments. When V&E lawyers were consulted about Enron's 10-Ks, 10-Qs, and other filings, they devoted very limited amounts of time to reviewing them. V&E had virtually no role at all in the dozens of press releases, earnings releases, and analyst calls that occurred during the purported class period and are cited most frequently in the Complaint.

The Court's application of the "creator" standard calls for immediate appellate review for the following reasons. First, it presents a pure question of law that satisfies all of the requirements of Section 1292(b). Second, the extraordinary size and complexity of this case imposes enormous burdens on a party like V&E. The Court's application of the "creator" standard to deny V&E's Motion To Dismiss leaves the firm facing the prospect of extensive discovery, myriad depositions, and a lengthy trial – all before it can obtain review of the Court's rulings – unless certification is granted under §1292(b). Third, the standard for primary liability adopted by most other courts – and which V&E will urge the Fifth Circuit to adopt – is a bright-line test that is not susceptible to subjective allegations about who did and did not "create" a particular disclosure. As explained above, plaintiffs in this action inaccurately alleged that V&E drafted and approved Enron's public disclosures. Under the bright-line test, such counter-factual pleading would not require a defendant to remain in the case past the motion-to-dismiss stage. If only parties identified as speakers in public statements may be liable under Section 10(b), then there can be no uncertainty about the identities of the proper defendants.

At least as to certain defendants, the Court rejected motions to dismiss based on the second question presented: a broad interpretation of subsections (a) and (c) of Rule 10b-5. While the Court's Order discussed Plaintiffs' allegation that V&E should be held liable under

Section 10(b) based on "structuring" and "providing advice" in connection with Enron's transactions (*see* December 20 Order at 196-97), Plaintiffs did not allege and the Court did not find that V&E acted as a principal in any of these transactions or that V&E invested money in the partnerships and entities in question. The Court also recognized that traditional limitations on attorney liability "might" protect the firm against such claims. (*See* December 20 Order at 73, 298).

Based on the language of the December 20 Order and the dismissal of Kirkland & Ellis, we do not read the Court as having ruled that V&E can be subject to Section 10(b) liability based on the firm's work as lawyers on Enron's business transactions. However, if this Court held that a lawyer may be liable under Section 10(b) because it worked on the issuing company's business transactions, this second question is clearly an issue of broad significance and worthy of certification.

BACKGROUND

Plaintiffs filed their Consolidated Complaint for Violation of the Securities Laws ("Complaint") on April 8, 2002. The Complaint alleged that V&E rendered legal services to Enron which helped Enron effectuate a fraudulent scheme. (*E.g.*, Compl. ¶ 70(a), (b)). Specifically, the Complaint criticized (1) V&E's purported role in authoring Enron's securities disclosures; (2) its legal work on certain transactions, and (3) its preliminary investigation of Sherron Watkins' concerns. (*E.g.*, Compl. ¶ 801). The Complaint, however, did not identify even one statement to the investing public that was actually made by, or attributed to, V&E. Instead of alleging direct misrepresentations by V&E, Plaintiffs generally asserted that V&E "drafted and/or approved the adequacy of Enron's press releases, shareholder reports and SEC filings." (Compl. ¶ 801; *see also id.* ¶¶ 67, 70(b), 136, 141, 215, 221, 292-93, 800-01, 824, 826-

27, 830-32, 834-35, 838, 843-44, 846-48). Plaintiffs then summarily asserted that V&E should be held liable for what its client said.

Plaintiffs also contended that V&E "participated in the negotiations for, prepared the transaction documents for, and structured Enron's LJM and Chewco/JEDI partnerships and virtually all of the related SPE entities and transactions . . ." (Compl. ¶ 801; *see also id.* ¶¶ 802-823). According to Plaintiffs, these underlying transactions were "manipulative devices which falsified Enron's reported profits and financial condition." (Compl. ¶ 801). Again, Plaintiffs did not identify any transaction in *the stock of Enron* that constituted manipulation of the trading activity of Enron stock as the term "manipulation" has been defined under the federal securities laws.

V&E moved to dismiss the claims asserted against it, principally on the ground that the claims alleged at most aiding and abetting, for which no private right of action exists under Section 10(b) of the 1934 Act as stated in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). The Court denied the motion stating that because Plaintiffs alleged that V&E was "materially involved in" and "structured and provided advice on" various Enron transactions, it had "'effected'" deceptive devices and contrivances under Rule 10b-5. (December 20 Order at 298; *see also* December 20 Order at 196, 197, 199, 200, 201, 202, 203). The Court noted that V&E "might" not be liable for this conduct if it had "remained silent publicly." (*Id.* at 298).

The Court went on to hold, however, that accepting as true the allegations in the Complaint, a claim had been stated against V&E because the firm "chose . . . to make statements to the public about Enron's business and financial situation." (*Id.*). The Court cited no statements actually attributed to V&E to support this holding; instead it based its conclusion on

Plaintiffs' allegations that V&E had "draft[ed] and approv[ed]" many of Enron's SEC filings, press releases and shareholder reports. (December 20 Order at 298 n.129; *see also* December 20 Order at 203, 205, 206, 207 n.96, 208, 210, 211, 213). In the Court's view, these allegations cast V&E as "essentially a co-author" of Enron's public statements such that primary liability under Section 10(b) could attach. (December 20 Order at 299). The determinative significance of the "co-author" status became even more clear as the Court granted the motion to dismiss of Kirkland & Ellis, a firm that had also been accused (wrongly in our judgment) of improperly engaging in the same allegedly fraudulent transactions. (December 20 Order at 300-01).

In finding that the Plaintiffs' allegations as to V&E were sufficient, the Court recognized that two "divergent" standards for holding secondary actors liable had developed in the case law since *Central Bank* (December 20 Order at 42), yet it declined to apply either one. Rather, it expressly adopted a standard of liability proposed by the SEC in its amicus brief. (December 20 Order at 57). Under the SEC standard, someone other than the attributed author of an alleged misrepresentation may be liable under Section 10(b) if that person "created" the statement in question. (December 20 Order at 52).

ARGUMENT

Under the criteria enumerated in 28 U.S.C. § 1292(b), certification of an interlocutory order is appropriate when the order involves:

(1) a controlling question of law;

(2) as to which there is a substantial ground for difference of opinion; and

(3) where an immediate appeal from that order may materially advance the ultimate termination of the litigation. *See* 28 U.S.C. § 1292(b) (2000); *Ass'n of Co-op. Members, Inc. v. Farmland Indus., Inc.*, 684 F.2d 1134 (5th Cir. 1982).

The Court's December 20 Order addressed the following questions of law:

1. Whether under *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), a party who is involved in "drafting and approving" allegedly false statements of others may be held liable to private plaintiffs under Section 10(b) of the Securities Exchange Act of 1934 without being identified in the statement.[1]

2. Whether allegations that a corporation's outside counsel participated in "structuring" or "giving advice" about transactions suffice to state a claim under Section 10(b) in the absence of misstatements, omissions or manipulative acts such as wash sales or matched orders.

Because these are controlling questions of law as to which there is substantial ground for difference of opinion, and because an immediate appeal from the Court's Order may materially advance the ultimate termination of this litigation, this Court should grant V&E's Motion. *See* 28 U.S.C. §1292(b).

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[1] On this point, the Court observed that the Second, Tenth and Eleventh Circuits and district courts in the First and Third Circuits would reach a negative conclusion and that the Ninth Circuit adopts a more lenient test, but it ultimately elected to follow the SEC-proposed test that has not been explicitly adopted by any Court of Appeals. (December 20 Order at 42-57). The proposed test urged by the SEC, in essence, is an attempt by the SEC to interpret the Supreme Court's holding in *Central Bank*. Traditionally, it is the province of the courts, not the SEC, to interpret Supreme Court decisions. *See, e.g., International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979) ("deference [to agency interpretation] is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history . . . [and on] a number of occasions in recent years this Court has found it necessary to reject the SEC's interpretation of various provisions of the Securities Acts.") (citing *SEC v. Sloan*, 436 U.S. 103, 117-19 (1978); *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 41 n.27 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-14 (1976); *United Housing Found., Inc. v. Forman*, 421 U.S. 837, 858 n.25 (1975); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 759 n.4 (1975) (Powell, J., concurring); *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 425-27 (1972)).

A. The Court's Order Involves Controlling Issues of Law.

This Court's Order denying V&E's motion to dismiss clearly involves controlling issues of law. Reversal of the Court's Order would dismiss V&E from the case. "There is no doubt that a question is 'controlling' if its incorrect disposition would require reversal of a final judgment . . . for a dismissal that might have been ordered without the ensuing district court proceedings." 16 Charles A. Wright, et al., Federal Practice and Procedure, § 3930 (2d ed. 1996). Accordingly, it routinely has been held that rulings on motions to dismiss present controlling questions of law. *See, e.g., United States v. Holmberg*, 19 F.3d 1062 (5th Cir. 1994); *In re Ichinose*, 946 F.2d 1169 (5th Cir. 1991); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988).

Rulings on motions to dismiss raising important issues under the federal securities laws have frequently been certified under §1292(b) . *See, e.g., Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551 (1979) (denial of motion to dismiss raising issue whether an employee's interest in a pension plan is an investment contract); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1273 (11th Cir. 1999) (denial of motion to dismiss raising novel questions under Private Securities Litigation Reform Act, including the standard for pleading scienter); *In re Healthcare Compare Corp. Sec. Litig.*, 75 F.3d 276, 278 (7th Cir. 1996) (denial of motion to dismiss based on specificity of securities fraud allegations); *In re Data Access Systems Sec. Litig.*, 843 F.2d 1537, 1538 (3d Cir. 1988) (issue as to proper statute of limitations under federal securities law); *In re Wash. Public Power Supply System Sec. Litig.*, 823 F.2d 1349, 1350 (9th Cir. 1987) (granting of motion to dismiss raising issue of whether a private right of action exists under § 17(a) of the 1933 Act); *Davis v. Davis*, 526 F.2d 1286 (5th Cir. 1976) (denial of motion to dismiss raising issue as to who is a purchaser or seller of securities).

Indeed, there is specific precedent for certification of issues relating to the meaning of the *Central Bank* decision. In *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837 (2d Cir. 1998), the district court dismissed the complaint but permitted the plaintiffs to amend to state a claim for conspiracy to violate Section 10(b). Defendants argued that conspiracy claims were barred by the *Central Bank* decision. The court certified the question for appeal under Section 1292(b), and the Second Circuit accepted that certification.

B. The Court's Order Presents Questions of Law as to Which There Is Substantial Ground for Difference of Opinion.

On its face, the Court's ruling on V&E's motion to dismiss involves questions of law as to which there are substantial grounds for difference of opinion. The key issue here – whether secondary actors such as lawyers can be held liable for securities fraud when they are not the identified authors of the allegedly fraudulent statements – is the subject of a split among the circuits. The Ninth Circuit has approved such liability, while three other circuits have not. The Court's December 20 Order recognizes the "divergent" standards adopted by various courts and devotes approximately twenty-five pages of detailed discussion to the varying points of view. (December 20 Order at 39-64). The Fifth Circuit has not addressed this fundamental issue since the Supreme Court's ruling in *Central Bank*. This is the paradigm situation in which interlocutory appeal is appropriate.

The Court's December 20 Order has heightened the disagreement on this critical issue by adopting the position advocated by the SEC that a person can be liable under Section 10(b) if he or she, "'acting alone or with others, creates a misrepresentation.'" (December 20 Order at 52 (quoting SEC amicus brief at 18)). This position is clearly inconsistent with the law of three circuits. *See Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1204 (11th Cir. 2001);

Wright v. Ernst & Young LLP, 152 F.3d 169, 174 (2d Cir. 1998); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1224-25 (10th Cir. 1996). Indeed, in *Ziemba*, the Eleventh Circuit considered but refused to follow a district court decision that had adopted the very same "creator" standard proffered by the SEC. *See Ziemba*, 256 F.3d at 1204 (citing but rejecting the approach to primary liability taken in *Carley Capital Group v. Deloitte & Touche, L.L.P.*, 27 F. Supp. 2d 1324 (N.D. Ga. 1998), in which plaintiffs had filed the same SEC amicus brief as was filed in this action). The Fifth Circuit ought to have an immediate opportunity to decide where it stands on this significant issue.

As recognized in the *Dinsmore* case discussed above, the fact that the Supreme Court's *Central Bank* holding has been subject to varying interpretations fully supports the application of § 1292(b) to this case. Splits of authority present perfect cases for interlocutory appeals under that provision. *See, e.g.*, *Grant v. Chevron Phillips Chem. Co. L.P.*, 309 F.3d 864, 866-67, 875 (5th Cir. 2002); *Doe v. Hartz*, 970 F. Supp. 1375, 1434 (N.D. Iowa 1997), *appeal accepted*, 134 F.3d 1339 (8th Cir. 1998); *Umatilla Waterquality Protective Ass'n v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1323 (D. Or. 1997); *United States v. Arkwright, Inc.*, 697 F. Supp. 1231, 1232 (D.N.H. 1988).

Another issue implicated by the Court's Order – whether conduct that involves no misrepresentation, omission or manipulative acts in the sense of wash sales, matched orders or similar transactions can give rise to Section 10(b) liability – is a similarly significant issue on which there is substantial difference of opinion. Although V&E does not believe that the Court denied its Motion To Dismiss based on this theory, the issue is highly significant because it raises the spectre of an entirely new category of liability under Section 10(b). Until now, the courts have limited the scope of liability under Section 10(b) to conduct that involves

misrepresentations, omissions by one with a duty to disclose, or manipulation of the trading activity of a stock. *See Central Bank*, 511 U.S. at 177 (stating that Section 10(b) "prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act"); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476-77 (1977) (stating that "manipulation" is "'virtually a term of art'" that refers to conduct that "in [a] technical sense . . . artificially affect[s] market activity").[2] The Court's analysis creates the potential not only for expanded liability for transactional lawyers but also that any entity which conducts business with an issuing company could be liable based on what the issuing company tells the public about its dealings. The presence of this issue, too, militates in favor of certification under § 1292(b).

C. An Immediate Appeal May Materially Advance the Ultimate Termination of This Litigation.

The Fifth Circuit has prescribed a practical approach to § 1292(b) certification that seeks to advance the statute's goal of avoiding the expense and delay of lengthy litigation by deciding close questions of law at the appellate level. *See Ex parte Tokio Marine & Fire Ins. Co.*, 322 F.2d 113, 115 (5th Cir. 1963). Granting certification here would advance that goal because it would resolve as early as possible whether V&E should remain a party to this enormous case and bear all of its burdens. In addition, an immediate appeal of the Court's Order will not delay the ultimate resolution of this case, as V&E will not request a stay of discovery

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[2] *SEC v. Zandford*, 122 S. Ct. 1899 (2002), cited in this Court's December 20 Order, is not to the contrary. The sole issue in *Zandford* was whether the alleged fraudulent conduct was "in connection with the purchase or sale of any security." 122 S. Ct. at 1901. *Zandford* hinged on a broker's omission in the face of a duty to disclose. It does not support any broader reading of the proscriptive language of Section 10(b) because there, the Supreme Court made clear that the essence of the violation was the broker's failure to disclose to customers to whom he owned a fiduciary duty. *See Zandford*, 122 S. Ct. at 1906 n.4 ("if the broker told his client he was stealing the client's assets, that breach of fiduciary duty . . . would not involve a deceptive device or fraud"). No such duty is implicated here.

based on certification or appeal of this Court's December 20 Order. Indeed, immediate appeal could substantially advance the ultimate termination of this litigation. If this case goes to trial and the Court's Order is ultimately reversed, undoubtedly there will be additional proceedings that could delay the eventual resolution of this matter. Retrial may even be necessary. Allowing the Fifth Circuit to establish the governing law sooner rather than later will serve the interests of justice, judicial economy and efficiency.

CONCLUSION

For these reasons, V&E's Motion for certification under 28 U.S.C. § 1292(b) should be granted.

Respectfully submitted,

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ATTORNEYS FOR VINSON & ELKINS L.L.P.

CERTIFICATE OF SERVICE

I certify that on January 16, 2003, I caused the foregoing to be served via electronic mail or first class mail in accordance with the Court's orders and the Federal Rules of Civil Procedure.

Gilbert O. Greenman/NGF

Gilbert O. Greenman

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	
Plaintiffs,	§	
vs.	§	**Civil Action No. H-01-3624 (Consolidated)**
ENRON CORP., et al.,	§	
Defendants.	§	

ORDER GRANTING DEFENDANT VINSON & ELKINS L.L.P.'S MOTION FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 1292(b)

On this day the Court considered Defendant Vinson & Elkins L.L.P.'s Motion for Certification under 28 U.S.C. § 1292(b). After considering the Motion, the Response, and all documents on file with the Court, the Court has determined that the Motion is in all respects meritorious and should be granted. The Court hereby orders that the Court's Memorandum and Order re Secondary Actors' Motion To Dismiss, filed December 20, 2002, is amended to state: "With respect to the portion of this Order denying Vinson & Elkins L.L.P.'s Motion To Dismiss, the Court hereby finds that said Order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from this Order may materially advance the ultimate termination of the litigation."

The Court hereby certifies for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) all issues raised in Vinson & Elkins L.L.P.'s Motion To Dismiss.

SO ORDERED this the ___ day of _____, 2003.

_____
MELINDA HARMON
UNITED STATES DISTRICT JUDGE